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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: SEP 05 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an international oil and gas consultant with his company, [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from his then attorney, [redacted] In this decision, the term "prior counsel" shall refer to Mr. [redacted] The petitioner retained new counsel, [redacted] after the filing of the appeal. The record contains no brief or other statement from the petitioner's new attorney of record.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (NYSDOT), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 14, 2011. In an accompanying letter, prior counsel stated that the petitioner "has been on the cutting edge of designing and implementing processes used in petroleum production. He has a significant record of achievement and original contribution as set forth in the attached, indicating that he has mentored hundreds of young petroleum engineers and other professionals."

Prior counsel observed that the petitioner is self-employed and therefore cannot obtain labor certification, while at the same time acknowledging the following passage from *NYSDOT*:

> The Service acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

Id. at 218 n.5. Prior counsel then stated:

> Thus the focus is not whether theoretically the labor certification process might or might not reveal a qualified candidate, as there can be no labor certification process in this self-employment case[,] but whether the applicant will serve the national interest to a substantially greater degree than would a U.S. worker with the same minimum qualifications. As this is an EB-2 case, the minimum qualifications would be bachelor's and five years' experience; the measurement then is whether applicant with 21 year's [*sic*] experience and various accomplishments will make a substantially greater contribution than a person with 5 years' experience, a single degree and no accomplishments.

The AAO disagrees with prior counsel's interpretation of *NYSDOT* as saying that a self-employed alien with more than the minimum qualifications presumptively qualifies for the waiver. The precedent decision does not merely state that an alien's classifications must exceed the minimum required for a given occupation. Rather, "[t]he alien must clearly present a significant benefit to the field of endeavor." *Id.* at 218. The petitioner must demonstrate "a past history of demonstrable achievement with some degree of influence on the field as a whole. . . . In all cases the petitioner must demonstrate specific prior achievements which establish the alien's ability to benefit the national interest." *Id.* at 219 n.6. Congress could have plainly exempted self-employed aliens from the job offer requirement, but did not. USCIS therefore has no basis to conclude that self-employed aliens are presumptively entitled to the waiver, or to a lower threshold of evidence to qualify for it.

Prior counsel contended that the petitioner's "skills and his proposed employment are so specialized . . . that there is virtually no chance that any American worker would qualify." The very purpose of labor certification is to determine whether qualified United States workers are available. Thus, prior counsel essentially argued that a labor certification is so likely to be approved that it would be a waste of time and resources to actually go through with the process, and that USCIS should acknowledge the foregone conclusion by approving the waiver. The AAO does not find this line of reasoning to be persuasive.

Prior counsel stated: "As energy development is in the current epoch a national security issue . . . . it is respectfully suggested that that in itself outweighs the normal requirement of labor certification." Absent a statutory mandate (such as the one Congress established for certain physicians at section 203(b)(2)(B)(ii) of the Act), USCIS will not designate a blanket waiver for any given occupation. *See NYSDOT*, 22 I&N Dec. 217. Eligibility must rest on the merits of the individual alien, rather than on the declared importance of the occupation or field of endeavor.

In a statement accompanying the petition, the petitioner stated:

> I have 24+ years of professional experience at the service of the hydrocarbons industry, working at the helm of many critical projects for some of the world's leading energy corporations in Latin America and the Caribbean. I am widely recognized for my genuine ability and unique talent to significantly improve the oil productivity levels of any organization in the energy industry . . . while improving its responsiveness against unforeseen events. . . . My rather unique expertise, which I have applied to reservoir and well surveillance and performance optimization operations, has reached acclaimed levels of success among the leading corporations in the energy industry that are concerned with minimizing operational costs and maximizing effective profit turn-around.
>
> Currently, I am recognized as a pioneer in the implementation of **Enhanced Oil Recovery (EOR) methodologies** to improve the productivity levels of the oil and gas field operation. I am considered a world renowned authority in methodologies such as Water Alternating Gas (WAG), Miscible Gas Injection and Water Flooding which very few people in the world have mastered. . . .
>
> My extensive knowledge and professional expertise are of utmost importance to the energy industry in its continuous search for improving the efficiency and reliability of their Exploration and Production operations through the implementation of state-of-the-art technologies. . . .
>
> I am internationally recognized as an Oil Production Optimization Expert with renowned expertise in groundbreaking Oil & Natural Gas Reservoir Testing/ Interpretation and Development Techniques.

[Emphasis in original.] The petitioner submitted various exhibits intended to establish exceptional ability, such as evidence showing that his salary has substantially exceeded the median wage for petroleum engineers. As explained above, exceptional ability is not presumptive evidence of eligibility for the waiver; it is, rather, one of two possible preconditions that an alien must satisfy in order even to be considered for the waiver.

Several witness letters accompanied the petition. [redacted] now corporate reserves [redacted], previously worked at [redacted] with the

petitioner. [redacted] asserted that the petitioner led "a multidisciplinary team, responsible for providing a pioneering integrated Planning and Financial Services approach to the company's Maturin District operations, which drastically revitalized the productivity level of that asset."

[redacted] who previously worked at [redacted] and is now the Latin America consulting manager for Halliburton, stated:

> [The petitioner] was appointed to lead the development of the Furrial Field, presently the second largest oilfield in the western hemisphere, with an estimated production capacity of 380,000 barrels of oil per day. Between the years of 1990 and 2000, [the petitioner] single-handily [*sic*] oversaw the most critical operations of the project, including location setup, perforation campaigns, and well assessment. . . . [His] approach became a "Best Practice" Model for future operations of similar characteristics. . . . Said initiative led to 114 successfully perforated oil-running wells, on a record time.

[redacted] now reserves regional manager for [redacted] in Spain, also praised the petitioner's work for [redacted] stating that the petitioner's "findings played a decisive role in the implementation of a water injection project that consisted of injecting 450 MMPC gas per day," which "allowed [redacted] to reach an unprecedented production level of 385000 Barrels of Oil per Day (BOD), while simultaneously building up the ground for the future development of 2800 Million Barrels (MMBLS) of proven oil reserves at [redacted]."

[redacted] strategic planning manager at [redacted] run petroleum company, stated:

> [The petitioner's] superior expertise in the technological side of most oil E&P operations, in addition to his flawless string of professional accomplishments has made him one of the most sought out authorities in South America when it comes to finding reliable and cost effective approaches to optimize oil reservoir production. Proof of the foregoing was his outstanding role as [redacted] where he was appointed . . . to accurately establish production projections, reservoir management and development strategies for several of [redacted] oil fields, throughout the whole country. . . . [H]e successfully applied a cutting-edge oil reservoir development methodology, named [redacted] since it is conducted under the "front end loading" philosophy. This initiative helped [redacted] to save more than US $200 Million Dollars in Infrastructure development, in addition to another US $600 Million Dollars associated with the optimization of well operations and reservoir development projects.
>
> I would also like to point out that the groundbreaking [redacted] Methodology, where [the petitioner] plays a key role, is presently being used on nearly 95% of [redacted] reservoir development projects. And more importantly, it has been certified by

> Mexico's National Commission of Hydrocarbons as the best methodology to be implemented during the design phase of any [redacted] exploration project.

[redacted] a field development technical evaluation manager at [redacted] praised the petitioner as "a pioneer in some revolutionizing methodologies currently linked to unprecedented levels of oil production optimization." Mr. [redacted] repeated figures claimed in other letters.

[redacted] global practice manager for workflow automation at [redacted] stated that the petitioner "led groundbreaking projects that aimed to increase the level of effectiveness of oil and gas reservoir monitoring and performance processes." Mr. [redacted] added that the petitioner "was actively involved in the development and testing of a new Gel that could block the production of water inside an oil well during the Multiple Zone Completion Phase," which "allowed oil operators to exercise more control on the management of their oil reserves." Mr. [redacted] was a "member of a multidisciplinary team strategically assembled by [the petitioner] to take on the above-mentioned tasks."

[redacted] now petroleum production modeling senior advisor at [redacted] worked with the petitioner at [redacted]. Mr. [redacted] credited the petitioner with a series of innovations that "helped [redacted] to boost its proven reserve level to new heights."

The petitioner submitted copies of conference papers from 1999 and 2000, describing his work on the [redacted] An October 2000 paper, "*Challenges Opportunities and* Reservoir Management of a [redacted] indicated that a "pressure maintenance project and . . . enhanced recovery methods . . . were estimated to . . . increase the oil recovery by 33% of the original oil in-place." The same paper also "provides information on current studies, whose short term implementation could lead to produce up to 55% of the original oil in-place."

The petitioner submitted translated copies of the cover page and an introduction from what appears to be a 2008 technical report prepared by [redacted]. The document identified the petitioner as one of ten collaborators. The record, however, does not appear to contain any of the substance of the report. The petitioner, therefore, established the existence of the report, but not its content.

The director issued a request for evidence on October 19, 2011. The director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but stated:

> [T]he letters do not show the beneficiary has had an impact on the field beyond any other equally valuable employee. The petitioner has not shown the beneficiary is responsible for the techniques he used or made contributions to the implementation of techniques which have influenced the field of petroleum engineering as a whole.

The director acknowledged the petitioner's published articles, but stated: "it is not clear these papers have had an influence on the field as a whole nor is it clear the beneficiary has continued to publish

papers in the field." The director asserted: "The petitioner must establish that the beneficiary has a past record of specific prior achievement with some degree of influence on the field as a whole."

In response, prior counsel stated that the petitioner "cannot file a labor certification, as he will be self-employed. This precludes discussion of labor certification." Prior counsel asserted that the petitioner has demonstrated a past record of impact and influence on his field, in the form of "proofs *from various high level persons in his field.*"

The petitioner submitted his own 13-page statement, intended to address various elements of the request for evidence. Regarding his low volume of published work, the petitioner asserted that "engineers are builders, adventurers, and problem solvers" rather than researchers, and that his "contributions as engineer stay within the industry in the form of advice while reports hardly ever result in news."

The petitioner stated:

> I am recognized as an expert in the implementation of **Enhanced Oil Recovery (EOR) methodologies** to improve the productivity levels of the oil and gas field operation. I am considered a world renowned authority in methodologies as Water Alternating Gas (WAG), Miscible Gas Injection and Water Flooding which very few people in the world have mastered.

The petitioner provided technical details about the above-named methods, and stated: "Throughout my professional career, I have always been at the forefront of strategic projects, serving some of the global leading corporations in the oil and gas industry. . . . My work has been critical in the exploration, acquisition and development of significant oil and gas fields in Venezuela, Mexico, Ecuador and USA." The petitioner quoted from several previously submitted witness letters.

The director denied the petition on January 20, 2012. The director acknowledged the submission of statements from the petitioner and witnesses, but found that they lacked important information. For instance, the director stated: "You declare [redacted] is currently using FEL Methodology on 95% of ongoing oil and gas field development projects. . . . However, you have not provided evidence which would show you developed this methodology. Instead, your attorney suggests you were an original user of this technology but not the developer."

The director acknowledged that the petitioner holds a patent, but found that the petitioner "did not provide evidence the patent was in widespread use." The director concluded: "the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States."

On appeal, prior counsel repeats several assertions from the response to the request for evidence. Prior counsel contends that the petitioner, with 24 years of "high level" experience, stands to benefit the United States "to a substantially greater degree than . . . an applicant with just 5 or even 10 years'

experience and no particular accomplishments." Prior counsel contends that the petitioner "clearly is vastly more qualified than a substantial majority of colleagues with the same minimal qualifications," which "is the standard that must be satisfied." Prior counsel asserts that the director impermissibly dismissed the petitioner's "pioneering" work with cutting edge technology and methodologies "because [the petitioner] did not invent them." Prior counsel states that the director "violated the Kazarian rule by explicitly formulating criteria beyond what is found in NYSDOT – which is the only authority for determining 'substantially greater benefit.'"

Prior counsel refers, above, to *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), in which the Ninth Circuit Court of Appeals ruled that USCIS adjudicators may not "unilaterally impose novel substantive or evidentiary requirements beyond those set forth" in the regulations or, by extension, precedent decisions. *Id.* at 1121. *NYSDOT*, however, addresses the very point that prior counsel contests on appeal. An alien's job-related training in a new method, whatever its importance, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. *NYSDOT*, 22 I&N Dec. 221 n.7. This passage directly relates to and supports the director's assertion that using a new technique is less significant than actually developing it.

The above being said, *NYSDOT* does not state that an alien's use of existing technology or methods is a disqualifying factor. Rather, it states that, all other things being equal, innovation carries greater weight than use of existing technology or methods created by others. An alien can qualify for the waiver without creating a popular new invention or devising an influential new technique in his or her field, provided that the petitioner is able to establish the alien's impact and influence in some other way.

Prior counsel states that the director, in the denial notice, "notes applicant's contribution to a **pioneering** (emphasis added) Integrated and Financial Services approach with an international petroleum company giant, but that the testimonial letter did not attribute the origination of the approach to the applicant" (prior counsel's emphasis). Prior counsel's wording suggests that the director found the petitioner's approach to be "pioneering." Review of the decision shows that the director was paraphrasing a witness letter from Aquiles Rattia Regalado that used that term.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not

presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The witnesses in this instance made numerous claims of fact rather than opinion. The petitioner did not submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters. Without supporting evidence, a claim regarding the petitioner's impact and influence is just that, a claim, regardless of whether it appears over the petitioner's own signature or that of a witness from whom the petitioner solicited a statement. The director, in the request for evidence, advised that "[t]he petitioner must provide independent objective documentation" to support claims about the significance of his work, but the petitioner responded only with statements from himself and his then attorney. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The submitted documentary evidence establishes that the petitioner has been active in his field, but it does not show that his work has significantly improved oil yields or otherwise increased the efficiency, security or environmental cleanliness of the petroleum and gas industry. Prior counsel contends that the petitioner is entitled to the waiver by virtue of being more than minimally qualified for the position he seeks, but that is not the threshold established by statute, regulation or case law. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.